SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000300-001 DT 08/18/2005

HONORABLE MARK R. SANTANA

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

COMMERCIAL VENTURES CORPORATION ANDREW M HULL

v.

JAMES P MCCAFTY (001) JAMES P MCCAFTY
9210 N 7TH AVE B6
PHOENIX AZ 85021

REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

NORTHWEST PHOENIX JUSTICE COURT

Cit. No. #CV05-07546FD

I. JURISDICTION

This court has jurisdiction pursuant to Article VI, Section 14 of the Arizona Constitution.

II. FACTS/PROCEDURAL HISTORY

Plaintiff Commercial Ventures Corporation (Commercial) leases a home to defendant James P. McCafty (McCafty) on a month to month basis. Commercial is a property management company. On October 22, 2003 Commercial issued a notice terminating the lease and requesting that McCafty vacate the premises by December 1, 2003. McCafty did not vacate On December 3, 2003, Commercial brought a forcible entry and detainer action against McCafty in NW Phoenix Justice Court. Trial was held December 12, 2003.

At trial, McCafty and Baron Abboud (Abboud) the owner of Commercial testified. McCafty stated that he met Abboud between October 20-22, 2003 at the property. McCafty complained that the home had a leak in one of the bedrooms and that the roof was leaking or caving in. The defendant also testified that on October 23, 2003 he complained to several agencies about the property. In particular, he complained to the Arizona Secretary of State, Community Legal Services and the Maricopa County Environmental Services Department. On October 23, 2003, McCafty also phoned the City of Phoenix Neighborhood Services Department and notified an agency inspector of the problems. McCafty testified that he received the notice of termination on October 24, 2003.

McCafty admitted that he was a "holdover' tenant, but argued that the eviction was a retaliatory action by Commercial, instigated by McCafty's complaints to Commercial and the government agencies concerning the condition of the home.

Abboud testified that he had met with McCafty at the residence, although he did not recall the date. He admitted that there was a leak at the back of the home. He recalled that the City of Phoenix had contacted him on December 2, 2003 concerning the home. The trial court determined that the forcible entry and detainer action was retaliation within the meaning of A.R.S. § 33-1381(B). The court entered judgment for McCafty and awarded him two months rent pursuant to A.R.S. § 33-1367.

Commercial filed a timely appeal.

Commercial filed an appellate memorandum. McCafty did not file a memorandum.

III. ANALYSIS

A. Introduction

On appeal, Commercial argues that the trial court committed reversible error because the facts did not support a finding of retaliatory action. Commercial asserts that the forcible entry and detainer action was justified by McCafty's holding over after receiving proper notice. In addition, Commercial contends that even if there was sufficient evidence to support a finding of retaliatory action, McCafty was not entitled to two months rent because he had not filed a counterclaim for damages.

B. Does the evidence support the trial court's finding of retaliation?

1. Standard of Review

A trial court's findings of fact are binding of an appellate court unless they are clearly erroneous or unsupported by any credible evidence. Wean Water, Inc. v. Sta-Rite Indus., Inc.,

141 Ariz. 315, 686 P.2d 1285, 1286 (Ct. App. 1984). In reviewing a trial court's findings, an appellate court's duty begins and ends with inquiring whether the trial court had before it evidence reasonably supporting its action viewed in the light most favorable to sustaining the findings; an appellate court will not weigh conflicting evidence on appeal. Imperial Litho/Graphics v. M.J. Enters., 152 Ariz. 68, 72, 730 P.2d 245, 249 (Ct. App. 1986).

2. Analysis

Commercial argues that the trial court erred because there was no evidence presented that would support a finding of retaliation. In particular, Commercial asserts that McCafty complained to the various government agencies after the notice of termination had been sent. But the trial court did have evidence before it that would reasonably support its finding that retaliation had occurred. McCafty's unrefuted testimony was that he complained about the conditions of the premises to Abboud sometime between October 20-22, 2003 and he contacted the government agencies on October 23, 2003. Abboud testified that the notice was mailed on October 22, 2005. McCafty's, uncontradicted testimony is that he received the notice on October 24, 2003.

A.R.S. § 33-1381(A) provides, in part:

> A landlord may not retaliate by increasing rent or decreasing services or by *bringing or threatening to bring an action for possession* after any of the following:
>
> > 1. The tenant has complained to a governmental agency charged with responsibility for enforcement of a building or housing code of a violation applicable to the premises materially affecting health and safety.
> >
> > 2. The tenant has complained to the landlord of a violation under § 33-1324. . .

A.R.S § 33-1381(A) (emphasis, the Court's).

Further, a presumption of retaliation arises under A.R.S. § 33-1381 where:

> In an action by or against the tenant, evidence of a complaint within six months prior to the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation. The presumption does not arise if the tenant made the complaint *after notice of termination* of the rental agreement. . .

A.R.S. § 33-1381(B) (emphasis, the Court's).

The trial testimony indicates that on sometime between October 20-22, 2003 McCafty complained about conditions at the house that violate A.R.S. § 33-1324(A) (2), (landlord's duty to maintain premises in a fit and habitable condition). Thereafter, on October 23, 2003 he complains to various governmental agencies, at least one of which, the Phoenix Neighborhood Services Department, presumably had some regulatory responsibility for the home.[1] These two complaints are protected by A.R.S. § 13-1381(A) (1) (2); an action within six months of these complaints would create the statutory presumption of retaliation provided for in A.R.S. § 33-1381 (B).

Commercial's forcible entry and detainer action is filed on December 3, 2003, within six months of McCafty's complaints. Evidence of an act of retaliation under § 33-1381(A) exists and the presumption arises under A.R.S. § 33-1381(B). Moreover, McCafty's testimony is that he did not receive the notice of termination until October 24, 2003, one day after he complained to the agencies and several days after he notified Commercial of the leaks. The language of A.R.S. A.R.S. § 33-1381(B) indicates that presumption arises if the complaints occur *before* the tenant has received notice of termination, regardless of when the notice was sent.

The evidence supports the trial court's finding of retaliation.

C. Could the trial court award two months rent to defendant when he did not file a counterclaim?

1. Standard of Review

An appellate court reviews questions of law involving statutory interpretation de novo. Forest Guardians v. Wells, 201 Ariz. 255, 258-59, 34 P.3d 364, 367-68 (2001). A reviewing court is therefore not bound by a trial court's interpretation and application of a statute.

2. Analysis

Pursuant to A.R.S. § 33-1367, the trial court awarded McCafty two months rent. Commercial asserts that because McCafty did not file a counterclaim for damages, he was not entitled to the award. Commercial might be correct if McCafty was seeking damages pursuant to A.R.S. § 33-1364, which authorizes a tenant to obtain damages for loss of rental value, substitute housing and other items of damage. But trial court's award arises under A.R.S. § 33-1381(B), which provides that the tenant is "entitled" to an award under A.R.S. § 33-1367.

[1] The record does not indicate whether any of these agencies have enforcement responsibility, thus invoking the protections of A.R.S. § 33-1381(A). But Commercial has not raised this issue on appeal and it will not be addressed.

A.R.S. § 33-1367, in turn, provides the award of double the tenant's rent as a sanction against the retaliating landlord in lieu of actual damages. That statute does not suggest that the tenant must file a counterclaim in order to be entitled to double rent. The increased rent s essentially a punitive measure imposed by the sanctioning court. Evidence of the monthly rental amount was presented to the trial court. The trial court had the authority to award damages pursuant to A.R.S. § 33-1367, regardless of whether McCafty had filed a counterclaim.

IV. CONCLUSION

This Court concludes that the evidence supports the trial court's finding of retaliation. Further the trial court had the authority to award double rent to McCafty as a sanction or damages pursuant to A.R.S. § 33-1367

IT IS ORDERED:

(1) The judgment of the trial court is affirmed;
(2) This matter is remanded to the NW Phoenix Justice Court for all further proceedings.